The deceased was a woman of some substance who had a rubber estate at Parit Puasa and lived there alone. On the morning of 28th March she was found dead on the floor of her house. She had been practically decapitated and there were numerous incised wounds on her body which suggested she had defended herself with considerable vigour against an assailant armed with a sharp instrument. A cupboard in her bedroom had been ransacked but there was no evidence one way or the other to show whether anything was missing.

It was the prosecution case that the appellant had killed the deceased and it was sought to be supported by a certain amount of circumstantial evidence.

In the first place the appellant was on visiting terms with the deceased and must have been aware that she was a woman of some substance.

In the second place, shortly before the killing the appellant had been short of money. There is nothing to show that he was seriously embarrassed financially but he had had to borrow a sum of about $85 to pay the quit rent on his land and he was having difficulty in raising money to buy musical instruments for some sort of orchestra in which he was interested.

Then one Awang, who it is to be observed had been prosecuted for murder in 1957 but acquitted on the ground of insanity, said that about ten days before the killing the appellant had approached him and said he was heavily indebted and had no money to buy clothing for his wife and he proposed to find the money by robbing the deceased and he suggested that this witness should join him. The witness naturally declared that he had declined this invitation. Another witness named Ahmad, a boy of nineteen, said that the appellant had also extended to him an invitation which he declined to assist in robbing the deceased.

Finally, it was urged that there was no evidence to support the appellant's own assertion that he was alone in his own house on the night of the killing although his wife was staying with her mother.

The case was summed up to the jury with considerable care. It was pointed out to them that the evidence against the appellant was purely circumstantial and they were told that before they could convict on circumstantial evidence such evidence "must rule out any other reasonable possibility before you can accept it as sufficient evidence upon which you may find him guilty." The jury, however, brought in a majority verdict of guilty with which the Judge agreed and the appellant was accordingly convicted.

We gave the evidence in the case our most careful and anxious consideration and in the event we were forced to the conclusion that having regard to the evidence the verdict of the jury could not be supported. If it were true the prosecution evidence certainly afforded grounds for very grave suspicion. The evidence of the witnesses Awang and Ahmad, if it was believed and that was a question for the jury, shewed that the appellant had expressed an intention of robbing the deceased shortly before she was in fact killed by someone whose motive was probably robbery. There was evidence, too, that the appellant at the material time was to some extent in need of money and that shortly after the killing he was in a position to pay off a small debt. There was not, however, a scrap of evidence to show that he was anywhere near the house of the deceased at any material time. There was not a scrap of evidence to shew that anything belonging to the deceased could be traced to him nor indeed that anything belonging to the deceased was missing from her house. The photographs in evidence and the medical evidence shew that the deceased put up a vigorous struggle for her life and that there was considerable effusion of blood all over the room where the killing took place yet there was not a scrap of evidence of any trace of blood being found elsewhere.

In our view then, as was said by Lord Hewart C.J. in the case of *Wallace* [1], "the case against the appellant.....was not proved with that certainty which is necessary in order to justify a verdict of guilty."

Perhaps it is unfortunate that the trial Judge did not direct the jury to return a verdict of not guilty at the close of the case for the prosecution although it must be remembered that he was not asked to do so by counsel. Nevertheless, in our view, the verdict could not stand.

Before departing from the case we would repeat the words of Murray-Aynsley C.J. in the case of *Kartar Singh & Anor.* v. *Rex* [2]:—

> " Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all."

Appeal allowed.

KOK HOONG v. LEONG CHEONG KWENG MINES LTD.

[O.C.J. (Ong J.) October 19, 1961]

[K.L. — Civil Suit No. 178 of 1956]

Practice and Procedure — Estoppel per rem judicatam — Judgment by default — Whether defendant estopped in subsequent action on same hiring agreement from disputing validity of agreement — R.S.C., O.25 r.2 — Civil Procedure Code (Cap. 7), Ch. xxxix.

Within the limits laid down by Lord Maugham and Lord Wright in the case of *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [3], a judgment by default is as good as any other to raise an estoppel.

A defendant against whom a default judgment had previously been entered for arrears of rent of machinery

hired to him is estopped in a subsequent action on the same hiring agreement from disputing the validity of the agreement and the plaintiff's claim for the return of the machinery and further arrears of rent accrued since the previous judgment.

Cases referred to:—

(1) *Bell* v. *Holmes* [1956] 3 All E.R. 449, 454.
(2) *Ord* v. *Ord* [1923] 2 K.B. 432, 439.
(3) *Morrison Rose & Partners* v. *Hillman* [1961] 3 W.L.R. 301.
(4) *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255, 257.
(5) *Green* v. *Weatherill* [1929] 2 Ch. 213, 221.
(6) *Henderson* v. *Henderson* (1843) 3 Hare 100, 114.
(7) *In re South American and Mexican Co., Ex parte Bank of England* [1895] 1 Ch. 37, 45, 50.
(8) *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [1939] A.C. 1.
(9) *Howlett* v. *Tarte* 10 C.B. (N.S.) 813.
(10) *Shib Chandra Talukdar* v. *Lakhi Priya Guha* A.I.R. 1925 Cal. 427.

TRIAL OF PRELIMINARY ISSUE.

B. K. Das (*T. K. Sen* with him) for the plaintiff.

N. A. Marjoribanks for the defendant.

Cur. Adv. Vult.

Ong J.: By consent of the parties the point of law raised by the plaintiff's reply in this action was set down for trial as a preliminary issue, pursuant to the provisions of Order 25 rule 2 of the Rules of the Supreme Court. The question for determination is whether the principle of estoppel *per rem judicatam* applies so that the defendant, against whom a default judgment had previously been entered for a sum alleged to be arrears of rent of machinery hired to him by the plaintiff as owner, is debarred in a subsequent action on the same hiring agreement from disputing the validity of the agreement and the plaintiff's claim for return of the machinery and further arrears of rent accrued since the previous judgment.

On June 30, 1954 Kuala Lumpur High Court Civil Suit No. 272 of 1954 was commenced by a summons in a summary suit for debt, under Chapter XXXIX of the former Civil Procedure Code. In paragraph 2 of the plaint it was stated that, under an agreement in writing dated June 20, 1952, the plaintiff let certain machinery and equipment on hire to the defendant for the term of 12 months at $2,500 per month; in paragraph 3, that on the expiry of the term of 12 months the hiring was continued on the terms and conditions of the original agreement; in paragraph 4, that default in payment of rent was made from September 20, 1953: and in paragraph 5, that pursuant to clause 7 of the hiring agreement the defendant was liable to pay interest on all arrears of rent at the rate of 12 per cent per annum. On November 3, 1954, judgment was entered against the defendant for the sum of $22,500 with interest at the agreed rate, and costs, by reason of the defendant not having obtained leave to appear and defend the suit.

The present action was commenced by summons issued on May 15, 1956 under the Civil Procedure Code then still in force. Paragraphs 2 and 3 of the plaint reproduce exactly paragraphs 2 and 3 of the earlier suit. In paragraphs 4 and 5 it was stated that, by arrangement with the defendant, the plaintiff retook possession of two diesel engines, while the remainder continued to be hired to the defendant on the terms and conditions of the original agreement, except that the amount of the monthly rent was reduced to $2,000, and the machinery remaining on hire were to be insured by the defendant for $80,000 only. The subsequent paragraphs recited the defendant's default in payment of rent from April 20, 1955, the defendant's liability under clause 7 of the hiring agreement for interest on arrears of rent, the determination of the hiring on December 19, 1955 by notice in writing, the demand for the return of the machinery and equipment and payment of all rents in arrear with interest, and the defendant's non-compliance with such notice. Finally, the plaintiff claims the amount of rent in arrears, interest thereon, damages for wrongful detention, return of the machinery and costs.

By its amended defence the defendant alleges in paragraph 1 that the plaintiff is and was at the material times a moneylender within the meaning of section 3 of the Moneylenders Ordinance, 1951. In the subsequent paragraphs the defendant sets out the circumstances under which the hiring agreement came to be made contemporaneously with a written agreement of sale of the same machinery by the defendant to the plaintiff, and the defendant contends, first, that the two agreements read together formed part of a single transaction having as its object the providing of security for money lent and interest thereon; secondly, that the agreements offended against the provisions of the Bills of Sale Enactment, and being void, passed neither title to nor right to possession of the machinery to the plaintiff; and, thirdly, that the claim for rent being in reality for interest, is unenforceable by reason of the Moneylenders Ordinance.

By his reply, joining issue, the plaintiff denies that he was a moneylender, or that the documents were Bills of Sale avoided by the Moneylenders Ordinance or otherwise, and he further pleads that the defendant is estopped by the judgment dated November 3, 1954, in Kuala Lumpur High Court Civil Suit No. 272 of 1954, between the plaintiff and the defendant, from contending either that the plaintiff is a moneylender, or that the transaction in question in the pleadings mentioned was a moneylending transaction, or that the documents are other than what they purport to be, or that they or either of them are or is void or that the plaintiff is entitled to the reliefs claimed.

As the default judgment was entered while the Civil Procedure Code was in force, it is interesting to note that the principles relating to *res judicata* were set out in express terms in section 6 of that Code, the relevant provisions being as follows:

"6. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression 'former suit' denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.

Explanation II. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other.

Explanation III. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

In actual fact this enunciation of the doctrine of *res judicata* is indistinguishable from the English law. McNair J. in *Bell* v. *Holmes* [1] has said: "Much valuable guidance on the topic of *res judicata* is to be found in the classic judgment of Lush J. in *Ord* v. *Ord* [2]," which case was considered also by Holroyd Pearce L.J. recently in *Morrison Rose & Partners* v. *Hillman* [3]. Lush J. in his judgment said:

"The words '*res judicata*' explain themselves. If the *res* — the thing actually and directly in dispute — has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of *res judicata*, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with *res judicata* in its strict sense. As is said in the notes to the *Duchess of Kingston's Case*, if the truth has been ascertained, the party against whom it has been ascertained is taken as admitting it. This is what the learned author says: 'An estoppel, therefore, is an admission; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it.' The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law."

There is again the statement of principle in the judgment of Somerwell L.J. in *Greenhalgh* v. *Mallard* [4] where he said:

"I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. In *Green* v. *Weatherill* [5] Maugham J. quoted some observations by Wigram V.C., in *Henderson* v. *Henderson* [6]: 'I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'."

As to the application of the principle to the present case, it is an admitted fact that in both proceedings the plaintiff was suing on the same hiring contract of June 20, 1952. But, whereas in the earlier action his claim was confined to rents in arrear and interest thereon, in the present action he claims the return of his machinery and damages for wrongful detention, in addition to rents in arrear and interest. The simple explanation of course is that the hiring had not been determined until some thirteen months after the first judgment had been entered. On this account, however, it is argued by counsel for the defendant that, because the previous action was for a simple debt, whereas the present one is for the return of chattels, there never was an *eadem quaestio*, and consequently, no *res* which could be said to be *judicata*. He contends that the claim to the machinery is a new issue now raised for the first time, to which the defendant could not formerly have pleaded, so that the latter was not then bound to raise his defence under the Moneylenders Ordinance, even if he might have done so. Counsel says further that the issue involving the chattels had never in fact been adjudicated upon by reason of the judgment having been entered by default: in other words, that a default judgment does not create an estoppel *per rem judicatam*. With the greatest respect to counsel, I regret that I am unable to agree with this argument because it seems to me to be setting up a distinction without any difference. The truth of the matter is that a judgment for the plaintiff in Civil Suit No. 272 of 1954 was not a judgment for him for a sum of $22.500 at large; it was a judgment for him on a claim for that sum being rents in arrear under a hiring agreement of machinery of which the plaintiff was the owner. What I have just said is a paraphrase of an excerpt from the judgment of Lord Herschell L.C., *In re South American and Mexican Co., Ex parte Bank of England* [7]. In that case Vaughan Williams J. said, at page 45:

"It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

Upon appeal from that judgment, Lord Herschell said, at page 50:

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much

as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

It seems to me clear beyond dispute that a judgment for rent claimed by the plaintiff as owner of chattels hired necessarily and directly involves, where there was no dispute, a declaration as to their ownership. The root of the plaintiff's title to the rent is his ownership. In an action for rent, as in Civil Suit No. 272 of 1954, I am of opinion that, when the hiring agreement was specifically pleaded, any question as to its validity was concluded once judgment had been entered for the rent claimed thereunder. That judgment not having been set aside still stands.

In support of his argument, counsel for the defendant cites certain *dicta* of the House of Lords in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* [8] That case involved the construction of the gold clause obligation contained in certain mortgage bonds issued by the appellants. In a previous action by the respondents against the appellants upon a single bond, the appellants did not enter appearance and judgment was obtained against them by default. In a subsequent action on 992 bonds of the same series, it was held that such a judgment did not operate an estoppel to prevent the appellants raising as a defence to the second action questions as to the construction of the bonds, though these were couched in the same terms as the bond upon which judgment was obtained by default.

Mr. Marjoribanks relied in particular on the following passages in the judgment of Lord Maugham L.C. and of Lord Wright. At page 19, Lord Maugham said:

"The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; but in my view the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be asserted beyond all possible doubt to be, identical with those raised in the previous action."

Then at page 21 he continued:

"I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are 'odious'; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action..... In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the *res judicata* in the accurate sense."

In Lord Wright's judgment there is the following passage at pages 37 – 38:

"No authority has been produced in which a party has been held to be estopped from raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default and omitted to raise the issue. The nearest analogy is the case of *Howlett* v. *Tarte* [9]. A defendant, sued for rent or a periodical payment under a building agreement, failed to plead issuably. His plea was struck out and judgment went against him for default of pleading under the procedure then current. He was sued for another instalment and by way of defence pleaded that the building agreement had been superseded by an agreement for a yearly tenancy which had been determined, so that the rent claimed was not due. It was held that he was not estopped. That decision has been explained as depending on the old system of pleading. But I think it depends on wider principles. I think it implies that default is not to be treated as an admission. Willes J. said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced. 'Nobody', he added, 'ever heard of a defendant being precluded from setting up a defence in the second action because he did not avail himself of the opportunity of setting it up in the first action.' It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I should accept these observations of Willes J., one of the greatest Common Law Judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept."

I do not think, however, that it would be right to conclude that their Lordships have gone so far as to lay down that a default judgment can in no case create an estoppel *per rem judicatam*. It is to be observed that Lord Maugham, in the passage quoted from his judgment, made it quite clear that there must be an *eadem quaestio* for estoppel to arise, and further, that "an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment." Lord Wright, too, has said: "All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides." In fact the decision turned on the unanimous opinion of their Lordships that in the earlier action there was a declaration limited to the single bond, but there was no issue then before the Court as to any or all the 992 bonds which were the subject-matter of the subsequent action, so that "the construction of each or any of these bonds was not a traversable issue in the previous action." In the words of

Lord Wright, "The estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found."

No other authority has been cited in support of the proposition that a judgment by default cannot raise an estoppel *per rem judicatam*. My own researches in this direction have been unproductive, and I am compelled to conclude that, within the limits laid down by Lord Maugham and Lord Wright, a judgment by default is as good as any other to raise an estoppel. For an Indian decision that an *ex parte* decree operates as *res judicata* in a suit for rent, see *Shib Chandra Talukdar* v. *Lakhi Priya Guha* [10]. It is therefore not open now to the defendant to say that a judgment *ex facie* for rent was in truth a judgment for interest. I accordingly hold that the plea of estoppel is good. Costs in the cause.

Order accordingly.

Solicitors: *T. K. Sen & Co.; Lovelace & Hastings.*

UDAYAR ALAGAN & ORS. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Good J.A., Azmi J.) October 23, 1961]

[Ipoh — F.M. Criminal Appeal No. 29 of 1961]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Case depending upon credibility — Statement from dock.

Although an accused person is within his legal rights when he elects to make a statement from the dock instead of giving evidence from the witness-box, in a case which must in the event depend on credibility, he takes this course at his own peril.

The appellants were charged with murder under section 302 of the Penal Code. There was evidence which made out that charge, if it was believed. There was evidence by the appellants to the contrary though two of them made statements from the dock instead of giving evidence from the witness-box. On appeal,

Held: the evidence and the substance of the defence were adequately put to the jury, and the jury had the benefit of listening to the witnesses themselves.

Case referred to:—

(1) *Shimmin's Case* 15 Cox C.C. 122, 124.

COURT OF APPEAL.

Jag-Jit Singh for the appellants.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): These four appellants were convicted for murder in contravention of section 302 of the Penal Code.

The charge was that on 8th April this year in some labourers' lines near Batu Gajah they killed a man named Jeevanandam in circumstances which amounted to murder and that this was done when they were acting together and in furtherance of a common intention which involved the deliberate killing of the deceased.

There was evidence which made out that charge, if it was believed. There was evidence by the appellants to the contrary, though here it must be observed that two of them took the dangerous course of making a statement from the dock instead of going into the witness-box and giving evidence. An accused person is, of course, entirely within his legal rights when he elects to take that course, but in a case which must in the event depend on credibility he takes it at his own peril. The rule was stated in *Shimmin's* case [1] in 1882 by Mr. Justice Cave in a passage which, so far as I am aware (and I am quite prepared to be told I am wrong), has never been criticised:—

> "A prisoner, though defended by counsel, may, if he chooses, himself make his statement to the jury. He ought to be heard in his defence, and have the opportunity of making his explanation of the circumstances proved against him. True, his statement was not made on oath, and that he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony."

In any event, to return to the instant case, in our view there was evidence, if it was believed, which made out the guilt of all four appellants. That evidence was accurately put to the jury and the defence was also adequately put to them by the learned trial Judge in a long and careful summing-up with which we can find no fault and the criticism of which amounts to no more than that it was not as favourable to the appellants as counsel would have liked it to have been.

The direction as to burden of proof has been criticised. Of course there are individual sentences in that direction which are open to criticism but the direction as a whole in our view was adequate and well supported by authority.

Again, it is true that every detail of the case for the defence, that every word said in evidence was not put to the jury. That is also true. In our view, however, the substance of the defence was adequately put to the jury and in any event they had the benefit of listening to the witnesses themselves.

In all the circumstances of the case we feel compelled to dismiss the appeal.

Appeal dismissed.

Re NG KANG LIM

[R. Cr. J. (Rose C.J.) October 25, 1961]

[Singapore — Criminal Revision No. 11 of 1961]

Criminal Procedure — Mandatory Order — Powers of revision of High Court under the Criminal Procedure Code (Cap. 132), s.311 — Delay in petitioning — Abuse of process of Court.

Although a mandatory order is one which is eminently appealable and for which revision is the remedy which should normally be sought, a petition for revision will not be entertained when it is made following a delay of more than nine months as this amounts almost to an abuse of the process of the Court.